

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





76-7225/31

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UNITED STATES COURT OF APPEALS

*for the*

SECOND CIRCUIT

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ORIGINAL  
WITH PROOF  
OF SERVICE

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P/S

AMERICAN DIETAIDS COMPANY, INC. and  
U.S. NUTRITION PRODUCTS CORP.,

Plaintiffs-Appellees  
and Cross-Appellants,

v.

PLUS PRODUCTS,

Defendant-Appellant.

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APPEAL FROM THE FEDERAL DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

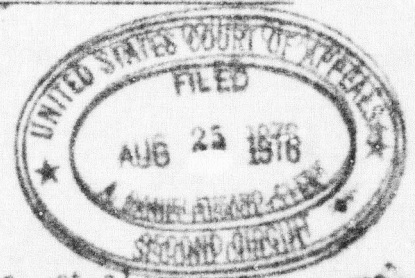
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BRIEF FOR  
AMERICAN DIETAIDS COMPANY, INC. et al.  
PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS

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ALAN H. LEVINE  
BREITENFELD & LEVINE  
350 Fifth Avenue  
New York, New York 10001  
212-239-4162

Attorneys for American Diet aids Company, Inc. et al.



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FOR THE SECOND CIRCUIT

-----X  
AMERICAN DIETAIDS COMPANY, INC. and  
U.S. NUTRITION PRODUCTS CORP., :  
  
Plaintiffs-Appellees :  
and Cross-Appellants :  
  
v. : APPEAL NOS. 76-7225  
: 76-7231  
  
PLUS PRODUCTS, :  
  
Defendant-Appellant. :  
-----X

BRIEF FOR  
AMERICAN DIETAIDS COMPANY, INC. et al.  
PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS

Issues Presented For Review

The cross-appeal raises the issues of whether or not the trial court erred in

(1) not ordering cancellation of the U.S. Patent and Trademark Office registration of the trademark PLUS owned by Plus Products, and

(2) not awarding attorney's fees to American Dietaids Company, Inc. et al.

The appeal raises the issues of whether or not the trial court should have

(3) barred American Dietaids' from using Plus Products' admitted laches as a defense to Plus Products' charge of trademark and trade name infringement, and

(4) found that American Dietaids' plus suffix trademarks infringe Plus Products' trademark PLUS.

## Statement of the Case

### Nature of the Case

This case began as an action for declaratory judgment in which plaintiffs, American Dietaids Company, Inc. and U.S. Nutrition Products Corp., sought a determination that:

(1) their trademarks including as a suffix the word "plus" do not infringe any trademark rights which defendant, Plus Products, may have in the word "plus",

(2) defendant, Plus Products, has been guilty of laches and is estopped from asserting any trademark rights it may have in the word "plus" against plaintiffs' trademarks including as a suffix the word "plus", and

(3) defendant, Plus Products, made a false representation to the U.S. Patent and Trademark Office concerning its date of first use of the trademark PLUS, as a result of which its alleged trademark PLUS is unenforceable and its Patent and Trademark Office registration for that trademark should be cancelled, and as a further result of which plaintiffs were needlessly required to bring this suit and should be awarded costs and reasonable attorneys' fees.

### Statement of Facts

Plaintiff, American Dietaids Company, Inc., (referred to hereinafter as AD), has been in business since 1937 (Okin trial testimony Page 6, Line 2 [hereafter: OTT, P6, L2]), and has continuously since that time sold dietary supplements, primarily vitamins and minerals (Stipulation of agreed facts, Paragraph 27 [hereafter: Stip., Par. 27]; see also OTT, P6, L24). AD has always sold, and



continues to sell, its products exclusively through retail health food stores. More specifically, AD sells its products to health food jobbers who in turn distribute them to retail health food stores throughout the United States (OTT, P8, L 18 to P 9, L 8).

Defendant, Plus Products (referred to hereafter as PP) has been in business through predecessors since 1939, and began selling vitamins for human consumption in 1940 or 1941. At that time PP used as a trademark a seal design including the words QUALITY PLUS superimposed over a plus symbol (Stip., Pars. 6 and 7). Through the years, PP altered its trademark twice. In 1964, the trademark was changed to delete the word "Quality", leaving the word "Plus" superimposed over the plus symbol (Stip. Par. 13). In 1972, the seal motif trademark was dropped entirely and replaced by a more modern rendering of the word PLUS together with a plus symbol inside the loop of the letter "P" (Stip., Par. 14). In 1954, PP began using on its labels the term "Plus Formula" followed by a number to differentiate between its different vitamin and mineral products (Stip., Par. 11).

At least as early as 1958, AD started using trademarks including as a suffix the word "plus" (these will be referred to hereafter as "plus suffix trademarks"), and as the years passed, AD added other plus suffix trademarked items to its line of products (OTT, P6, L 23 through P 17, last line, and Exhibits 1-11; also, P23, last line through P25, L 21, and Exhibits 12 and 13).

Listed below are the plus suffix trademarks which have been and are used by AD, as well as the year each was first used, and a description of the product on which each trademark is used (Stip.,



Pars. 29 and 30):

<u>Trademark</u>	<u>Year of First Use</u>	<u>Product</u>
LIVER PLUS	1958	Liver tablets
ALFALFA SEED PLUS	1958	Alfalfa seed tablets
BONE PLUS	1958	Vitamin-mineral tablets
ROSE HIPS VITAMIN C PLUS	1959	Vitamin C tablets
ACEROLA PLUS	1960	Vitamin C tablets
WONDEROLA PLUS	1961	Vitamin-mineral tablets
LECITHIN PLUS	1961	Lecithin capsules
BREWERS YEAST PLUS IRON	1961	Brewers yeast and iron tablets
SAFFLOWER PLUS	1962	Safflower capsules
VITAMIN A PLUS	1962	Vitamin A tablets
VITAMIN E PLUS	1962	Vitamin E tablets
WHEY-LAC PLUS	1962	Tablets containing lactic acid, lactose, and whey
ALL-CAL PLUS	1962	Vitamin-calcium tablets
CAMU PLUS	1967	Vitamin C tablets
E-CEROLA PLUS	1973	Vitamins C and E tablets

In 1957, Milton Okin President of AD, became aware of acerola berries and their very high vitamin C content. After much experimentation, he succeeded in concentrating the juice of these berries and powdering it so that a chewable vitamin C tablet could be made using this rich source of natural vitamin C. These tablets were brought to market in 1960 under the trademark ACEROLA PLUS (OTT, P19, L16 to P 22, L24). ACEROLA PLUS tablets have been sold continuously by AD since 1960, and by the first quarter of 1974 AD



had sold more than seven million dollars worth of these tablets (Stip., Par. 32). The success of this product has been outstanding. Nolan G. Draney, president of PP, has pointed out that the competition in vitamin C products is very heavy, and AD's ACEROLA PLUS is probably the forerunner in the vitamin C marketplace (Draney deposition, page 17, lines 26-28).

In 1967, AD marketed for the first time vitamin C tablets made with the concentrated and powdered juice of camu-camu berries. In a situation similar to that with acerola, Milton Okin became aware of these berries, which grow in South America, and AD was the first to market tablets containing this material. The tablets are sold under the trademark CAMU PLUS. (OTT, P 23, L18 to P24, L17). CAMU PLUS tablets have been sold continuously since 1967, and by the first quarter of 1974 AD had sold more than one million dollars worth of these tablets (Stip., Par. 32).

AD has also sold many hundreds of thousands of dollars worth of its other products bearing plus suffix trademarks (Stip., Par. 32). The sales of AD's products has been made through health food jobbers and retail health food stores throughout the United States since sales of each product began (Stip., Par. 33). In addition, between 1960 and the first quarter of 1974, AD spent more than two million dollars to advertise its plus suffix trademarks (Stip., Par. 34).

PP has also sold many millions of dollars worth of its products, the bulk of these sales being subsequent to 1968 when the company became publicly held (Stip. Par. 16). Until 1960, sub-



stantially all of PP's sales were by mail order, and until 1954 most of the sales were to chiropractors (Stip., Pars. 19 and 20). PP first sold its products through health food jobbers and retail health food stores in 1960 (Stip., Par. 22).

On July 7, 1970, an attorney representing PP wrote letters (Appendix, P.13-15) to AD and its affiliated company U.S. Nutrition Products Corp. (both referred to herein as AD) stating that PP considered AD's plus suffix trademarks to infringe its trademark PLUS. AD replied through its attorney denying infringement (Appendix, P. 19). After a further exchange of correspondence (Appendix, P. 20-23) in which PP's attorney stated that PP was "committed to a program of aggressive action against infringers", AD brought this action for declaratory judgment on April 13, 1971 (Plaintiffs' Trial Exhibit 56).

The trial court, after a trial before Judge K.T. Duffy without a jury, reached the following conclusions:

1. PP's registration of the trademark PLUS should not be canceled (Appendix, P. 39);

2. PP is estopped by laches from asserting any claim for infringement against AD (Appendix, P. 42);

3. There is no likelihood of confusion between AD's plus suffix trademarks and PP's trademark PLUS and trade name PLUS PRODUCTS, and hence no infringement (Appendix, P. 41 and 47); and

4. PP's charge that AD has been guilty of unclean hands is unsupported by the evidence.



## Argument

### Summary

The trial court refused to cancel PP's registration of PLUS on the ground that AD did not put into evidence the Patent and Trademark Office file history of that registration. This is error because there is ample evidence in the case to support a finding that PP made a false representation to the Patent and Trademark Office concerning its date of first use of the trademark PLUS.

PP does not dispute the finding of laches, and hence it is agreed by both sides that PP was guilty of laches.

The finding of no likelihood of confusion, and hence no infringement, is correctly based upon the facts that (a) purchasers of the parties' products are sophisticated and hence capable of distinguishing between the respective trademarks of the parties, (b) the distinction of AD's trademarks, e.g. ACEROLA PLUS, is in the combination of words and not in any single word of a trademark, (c) AD's trademarks have acquired a secondary meaning making them all more similar to each other than to PP's trademark, (d) AD originally adopted its plus suffix trademarks in good faith, (e) PP's trademark PLUS is weak and hence entitled to a narrow scope of protection, and (f) injury to AD by enjoining its use of plus suffix trademarks would be enormous and irreparable.

PP's allegation that AD has been guilty of unclean hands was found by the trial court to be unsubstantiated. This finding is correct since the allegation is completely unsupported by the



record even when the new case (United States v. Park) cited by PP in its brief is considered.

Registration of Trademark PLUS  
Should Have Been Canceled

PP's Patent and Trademark Office registration of the trademark PLUS is No. 789,307 (Appendix, P. 17 and 18). Inspection of the registration reveals the following information:

(1) the application to register the trademark PLUS was filed in the Patent Office on December 30, 1963, under Serial No. 183,787;

(2) the applicant, Plus Products, claimed as a date of first use of the trademark PLUS "on or about January 1, 1940", and claimed as a date of first use of the trademark PLUS in interstate commerce "on or about January 1, 1941."

It is these claimed dates of first use which are false.

As may be seen from the Stipulation of Agreed facts, Paragraph 7, in 1940 or 1941 PP used a trademark which looked like a wax impression seal. It had a generally circular border within which was a cross or plus symbol. Superimposed over the horizontal cross bar of the plus symbol was the word "quality" in a script form. Superimposed over the vertical cross bar of the plus symbol was the word "plus", the "pl" being above the word "quality" and the "us" below. Thus, the word "plus" was dissected, and did not appear as a unitary word. Obviously, such a trademark would be read as QUALITY PLUS. This trademark was used by PP until 1964.



The illustrations shown on Pages 4 and 5 of the Stipulation make it clear that the QUALITY PLUS and seal design trademark was the only trademark used by PP at that time. Not until 1954 did PP depart from the labeling practice shown on Pages 4 and 5 of the Stipulation (see top of Page 7 of the Stipulation). However, at that time, the trademark QUALITY PLUS and seal design was not changed. The only alteration to the PP label was addition of the designation "Plus Formula \_\_\_\_\_".

Clearly, neither the QUALITY PLUS and seal design trademark nor the designation "Plus Formula \_\_\_\_\_" constitutes use of the trademark PLUS.

It was not until approximately 1964 that PP changed its trademark to the form shown at the top of Page 8 of the Stipulation. This form shows the word PLUS superimposed over a wax impression seal design.

It is fundamental that only trademarks which are actually used in commerce can be the subject of an application to register those trademarks in the Patent and Trademark Office. 15 USC 1051 begins with "The owner of a trademark used in commerce may register his trademark under this Act..." and continues by requiring as part of the application "(a) (1)...the date of applicant's first use of the mark, the date of applicant's first use of the mark in commerce [meaning commerce which Congress is authorized to regulate]".

If PP had been truthful in its application, it would have claimed a date of first use, and first use in commerce, of the trademark PLUS as approximately 1964 (no doubt slightly earlier



since its application was filed December 30, 1963). Instead, it claimed a first use in 1940, and first use in commerce in 1941. However, from 1940 or 1941 to about the time its application was filed, PP had not used the trademark PLUS, but instead had used the trademark QUALITY PLUS and a seal design.

Regardless of why PP made the false representation which it did to the Patent and Trademark Office, the result is that PP obtained a registration which it could use to improperly harass competitors and others, using plus suffix trademarks, of which there have always been many. PP's Trial Exhibit R supports this conclusion, since it evidences a rather indiscriminate program of opposing in the Patent and Trademark Office others attempting to register plus suffix trademarks used on such diverse products as foods, vitamins, medicated therapeutic applicator pads, medicine, hand cream, animal food, and cosmetics.

AD has been damaged by PP's misrepresentation to the Patent and Trademark Office. If PP had been truthful, and claimed a date of first use of approximately 1964, this litigation would not have been necessary. After being charged with infringement by PP, AD would have shown that most of its plus suffix trademarks were adopted prior to 1964, and hence PP was in no position to challenge their continued use. No doubt that would have been the end of the controversy. Instead, due to PP's statement that it was "committed to a program of aggressive action against infringers", AD felt compelled to bring this suit to obtain a declaration of its rights in its valuable plus suffix trademarks.



In view of the circumstances described above, the trial court should have (1) ordered cancellation of PP's Registration No. 789,307, as provided for in 15 USC 1119, and (2) awarded attorneys' fees to AD pursuant to 15 USC 1120. The applicable statutory provisions read as follows:

"In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore cancelled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Commissioner, who shall make appropriate entry upon the records of the Patent Office, and shall be controlled thereby (15 USC 1119)".

"Any person who shall procure registration in the Patent Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof (15 USC 1120)."

(1) Cancellation

A false representation to the Patent Office in an application to register a trademark is grounds for cancellation of the registration resulting from that application under 15 USC 1119. National Trailways Bus System v. Trailway Van Lines, Inc., 269 F Supp 352, (DC ENY, 1965); Electrical Information Publications, Inc. v. C-M Periodicals Inc., 163 USPQ 624 (DC ND Ill., 1969).

The trial court held that because AD failed to put into evidence the Patent and Trademark Office file history of the PLUS registration, there was a failure of proof of a false representation by PP, and this failure of proof defeats AD's application for cancellation of PP's registration (Appendix, P.39). In this the



court erred. There was no need to place the file history in evidence, since the record is sufficient without it to support the conclusion that a false representation was made to the Patent and Trademark Office.

As pointed out above, the Stipulation of Agreed Facts, Paragraph 7, makes it clear that in 1940 or 1941, PP was using the trademark QUALITY PLUS combined with a design. No one looking at that trademark could possibly say that it represents use of the word "plus" alone as a trademark. The only time that one word of a composite trademark can be said to function alone as a trademark is when that word stands out in the composite trademark and creates a commercial impression on prospective customers apart from the commercial impression created by the trademark as a whole.

How can it be said that the wax impression seal trademark, which was the only trademark used by PP from 1940 or 1941 to 1964, represents use of the trademark PLUS? The word "plus" does not even appear in a unitary form in the trademark, but instead is bisected by the word "quality". Why does PP contend that this original trademark shows use of the word "plus" as a trademark and not use of the word "quality" as a trademark. Clearly, PP was not using the trademark PLUS in 1940 or 1941.

Nevertheless, the PLUS registration itself, which is in evidence, states on its face that PP first used the trademark PLUS "on or about Jan. 1, 1940; in commerce on or about Jan. 1, 1941". The Patent and Trademark Office did not make up these dates; these dates appear on the registration because PP claimed these dates of



first use in its application for registration. Such a claim was obviously false.

Therefore, it is clear from the record in this case, without resort to the registration file history, that PP made a false representation to the Patent and Trademark Office concerning its dates of first use of the trademark sought to be registered.

AD began using plus suffix trademarks at least as early as 1958. Had PP been truthful in its application for registration of the trademark PLUS, it would have claimed a date of first use of 1964, or perhaps 1963, well after AD's first use of plus suffix trademarks. Thus, the record shows not only a false representation by PP to the Patent and Trademark Office, but also an unconscionable attempt by PP to enforce rights which it appeared to have as a result of the existence of the registration, but to which it was really not entitled, all to AD's serious damage. For these reasons, the PLUS registration should be canceled.

## (2) Attorneys' Fees

When a registration is procured on an application involving a false statement, attorneys' fees incurred by a party in defending against a claim made to harass that party by means of the registration constitute damages sustained in consequence of the procuring of the registration within the meaning of 15 USC 1120. Academy Award Products, Inc. v. Bulova Watch Company, Inc., 233 F 2d 449 (CA 2, 1956).

Furthermore, as used in 15 USC 1120, "false" and "fraudulent" are not synonymous. Damages are recoverable under this section regardless of whether the representation to the Patent Office was



negligently incorrect or was made with intent to deceive.

Simmonds Aeroaccessories, Ltd. v. Elastic Stop Nut Corporation of America, 158 F Supp. 277 (DC NJ, 1958).

In considering an award of attorneys' fees under 15 USC 1120, it is also proper to consider the good faith of the person accused of trademark infringement, and the long silence by the owner of the registration before making an accusation while the accused's operation becomes more and more successful. These factors, combined with the false representation to the Patent and Trademark Office compel the conclusion that the registration owner's activities are for the purpose of harassing the accused. Merry Hull & Company v. Hi-Line Co. Inc., 243 F Supp 45, (DC SNY, 1965).

The trial court found that AD adopted its plus suffix trademarks in good faith (Appendix, P.40), and that PP maintained a silence so long before making an accusation as to give rise to laches. Thus, this is clearly an appropriate case for the award of attorney's fees.

Plus Products Is Estopped By Laches  
From Asserting Trademark Infringement Against  
American Dietaids

The trial court found that PP delayed in asserting its claim, and that AD was justified in relying on PP's silence to build a large business involving plus suffix trademarks. Consequently, the court found PP guilty of laches and hence estopped to assert any claim for infringement (Appendix, P 42).

PP does not deny laches in its appeal brief, nor does it



contend that the trial court committed error in upholding AD's laches defense. Consequently, the holding that PP has been guilty of laches is not in dispute. PP does claim, however, that AD has unclean hands and as a result should be denied its laches defense. This unsupported charge will be discussed below.

The Plus Suffix Trademarks  
of American Dietetics Do Not  
Infringe the Trademark PLUS  
or the Trade Name of Plus Products

The trial court found no likelihood of confusion between AD's products, bearing plus suffix trademarks, and PP's products, bearing the trademark PLUS and the trade name PLUS PRODUCTS. Therefore, AD's trademarks do not infringe PP's trademark or trade name.

In finding no likelihood of confusion between a plus suffix trademark and PP's trademark PLUS, the trial court is in good company. In footnote 8, the trial court refers to the decision of the Patent and Trademark Office Trademark Trial and Appeal Board entitled Plus Products v. General Mills, Inc. 188 USPQ 520. In that case, PP opposed registration by General Mills of the trademark PROTEIN PLUS for a breakfast cereal. In dismissing the opposition, the Board points out on page 522, the dictionary definition of "plus", refers to the reason PP adopted PLUS as a trademark, which is the same reason given by AD herein, and holds that to purchasers "the word 'PLUS' would have the significance attributed thereto by the dictionary and witness referred to above; and that in a trademark sense, it is a weak rather than an inherently strong mark".

The Board also states, on the same page, that "Moreover



we are further of the opinion that applicant's mark is no more similar to opposer's mark 'PLUS' than opposer's mark is to the marks 'MILK PLUS' and 'FOOD PLUS' which were cited against opposer's application for registration". The trial court apparently believed that these statements are equally applicable in the present case.

Subsequently, the case was appealed by PP to the United States Court of Customs and Patent Appeals (CCPA) and the dismissal of the opposition was sustained. Since the opinion of the CCPA will not be reported, a copy is included at the end of this brief. The paragraph appearing on the last page of the opinion is relevant to the question of likelihood of confusion in the present case, and for that reason bears repetition:

"Finally, we note that there are numerous food and food supplement products available whose marks end with PLUS (e.g., ORANGE PLUS) and there are numerous trademark registrations and applications in which the marks end with PLUS. Even though such marks were used subsequent to opposer's first use, they still reflect upon the state of mind of purchasers. This widespread use of the word PLUS, in the trademark sense, indicates that consumers have a high degree of sophistication in buying goods with PLUS as part of the trademark. Familiarity in with such trademarks upon goods not originating with opposer would lead purchasers to infer that PLUS signifies its common dictionary definition. (Webster's Third New International Dictionary (1971) defines "plus" as "something additional or extra.") Furthermore, viewing the marks PROTEIN PLUS and PLUS in their entireties, as we must, we perceive little similarity of meaning, sound, or commercial impression. Thus, we must agree with the board that there is no likelihood of purchasers being confused, mistaken, or deceived regarding the origin of breakfast cereals labeled PROTEIN PLUS."

Another of the many opposition proceedings instituted by PP



in the Patent and Trademark Office, and the only other one to AD's knowledge which has thus far been decided, is Plus Products v. Sterling Food Company, Inc., 188 USPQ 586. Here again, the Trademark Trial and Appeal Board dismissed PP's opposition to registration of the trademark NATURE PLUS used on bread and breakfast cereal. The Board found no likelihood of confusion, even though it agreed with PP that there are situations in which the goods of the parties could be encountered by the same persons under marketing conditions and circumstances that could cause them to attribute these goods to the same producer if they were to be offered with the same or similar marks. The last sentence of the Board's opinion is relevant here:

"It is therefore our opinion that persons encountering bread under the mark 'NATURE PLUS' in the marketing environment surrounding the sale of such a product would attribute to the term 'PLUS' its normal adjectival meaning and would not, in any way, associate this product with 'PLUS PRODUCTS' or the producer of 'PLUS' vitamins, food additives, and the like."

The trial court based its holding of no likelihood of confusion on a number of findings, all of which are amply supported by the evidence. The court found that the health food buying public is quite sophisticated and able to distinguish between the products of the parties (Appendix, P. 44). This finding was based on the testimony of Milton Okin (OTT, P. 51, L. 25 through P. 52, L. 22), which the court found "compelling". Based on conversations with hundreds of health food purchasers, both at conventions and during regular visits to health food stores, Okin testified that as a group, health food store customers



are the most knowledgeable and anxious people about their health, and whatever they put into their mouths. They know about vitamins and potencies, and read everything on a product label, even the fine print. They are very sophisticated, comparing prices, potencies, and advertising. In health food stores, the customer has an excellent opportunity to view products displayed on shelves, pick them up, and read the labels. They are not rushed by anyone, and they spend much time reading labels.

The trial court correctly analyzed the fact that in registering the trademark ACEROLA PLUS, the Patent and Trademark Office found that this composite mark has acquired distinctiveness, rather than either one of the words alone (Appendix, P. 46). This conclusion is supported by the millions of dollars worth of sales by AD of ACEROLA PLUS tablets and other products bearing plus suffix trademarks, and the millions of dollars spent in advertising these products.

The trial court further found that AD's plus suffix trademarks have acquired a secondary meaning (Appendix, P. 47) over the eighteen years they have been in use. This long usage combined with the tremendous dollar volume of sales and advertising, is certainly sufficient basis for a finding that at least the trademarks ACEROLA PLUS and CAMU PLUS have acquired a secondary meaning, i.e., they have become distinctive of AD's products alone. When a trademark acquires a secondary meaning, purchasers have come to recognize that the trademark indicates a particular, although perhaps unknown, source of origin of the goods. The trial court correctly decided that all the other AD plus suffix trademarks, regardless of when



adopted or whether or not they have acquired a secondary meaning, are more similar to AD's own plus suffix trademarks than to PP's PLUS trademark.

The finding that AD adopted its plus suffix trademarks in good faith (Appendix, P. 42, footnote 4) is supported primarily by the fact that the original marks of this type were adopted at an early date, and that at the time most of these marks were adopted by AD, it had no knowledge of PP or the PLUS trademark.

The trial court found that Milton Okin, the principal of AD who selected the plus suffix trademarks used by AD, was unaware of PP in 1958, when AD's first plus suffix trademarks were being introduced (Appendix, P. 38 and 40). Okin became aware of PP, at the earliest, in the early 1960's (OTT, P. 48, L3-12). Other evidence supports Okin's testimony. PP's products were not sold through health food stores until 1960, and PP did not register the trademark PLUS in the Patent Office until 1965. As pointed out above, four of AD's plus suffix marks were adopted prior to 1960, and nine others were adopted in the period 1960-1962. Thus, clearly AD had no intention of obtaining a free ride on the reputation of PP, assuming PP had a reputation worth riding on at the time AD adopted its plus suffix trademarks.

Okin's reason for using the word "plus" as a suffix in trademarks for some of AD's products was to indicate that the product had something added, that there was something extra (OTT, P. 6, L 25 to P. 7, L3). This testimony has the ring of truth. Even Mr. Ingoldsby, principal of PP from 1939 to 1968 agrees that someone would use a plus suffix trademark to connote



that they had a product with something else in it (Ingoldsby Deposition, Page 75, Lines 13-18). Mr. Ingoldsby further testified that he did not become aware of AD's ACEROLA PLUS tablets until 1963 or 1964 (Ingoldsby Deposition, P. 65, L. 15 to P. 66, L. 24), which corresponds to Mr. Okin's testimony concerning when he first became aware of Plus Products. The trial court also refers to the fact that AD registered its trademark ACEROLA PLUS in the Patent and Trademark Office before PP registered the trademark PLUS, as further evidence of AD's good faith in adopting and continuing to use its plus suffix trademarks (Appendix, P. 47).

The trial court quoted approvingly the finding of the Trademark Trial and Appeal Board in Plus Products v. General Mills, Inc., 188 USPQ 520, "that in a trademark sense PLUS is a weak rather than inherently strong mark". This thought is also implied in footnote 5 to the opinion (Appendix, P. 45). AD produced 462 U.S. Patent and Trademark Office trademark registrations covering plus suffix marks (AD's Trial Exhibits 41-45). Furthermore, 33 of these registrations cover vitamins and other dietary supplements (Exhibit 41) and 44 of these registrations cover food products (Exhibit 42). The word "plus" is used in trademarks on many health food store, pharmacy, and supermarket products which have actually been purchased by plaintiff (AD's Trial Exhibit 40). The word "plus" appears as the first word of 13 entries in the Manhattan Telephone Directory (AD's Trial Exhibit 53), and products bearing trademarks including the word "plus", both in and out of the health food field, have been advertised extensively, as indicated by AD's Trial Exhibits 33-39 and 46-51. Furthermore, the word "plus", as



part of PP's prior adopted trademark QUALITY PLUS is obviously not coined, being an ordinary English word, and is not arbitrary as applied to the goods of the parties since it connotes a positive attribute and as such has a laudatory significance when used in a trademark. For all these reasons, PLUS is a very weak trademark.

The trial court also pointed out that no actual confusion between the trademarks of the parties was demonstrated (Appendix, P. 41).

The injury to AD by enjoining its use of plus suffix trademarks was found by the trial court to be enormous and irreparable (Appendix, P. 41). AD's huge sales of these products, its large investment in advertising and promotion of these trademarks, and its substantial investment in plant and equipment to make these products need not be repeated. Further, the court found that sales of plus suffix trademarked items represent roughly 1/3 to 2/3 of AD's total annual sales. In contrast, the gain to PP by issuance of such an injunction would be slight, if any, since the trial court found that PP had not proved any harm to it by AD's use of plus suffix trademarks. In fact, PP's sales have increased steadily.

Finally, a sensible way to view the likelihood of confusion between marks such as those in issue here was described by the Patent and Trademark Office Trademark Trial and Appeal Board in Jiffy, Inc. v. Jordan Industries, Inc., 167 USPQ 563 (1970):



"It is settled that highly suggestive terms, because of their suggestive connotation and possible frequent employment in a particular trade as a part of trade designations, have been considered to fall within the category of 'weak' marks, and the scope of protection afforded these marks has been limited to the substantially identical designation and/or to the subsequent use thereof on substantially similar goods. Thus, unlike in the case of an arbitrary or unique designation, the addition of other matter to a highly suggestive or laudatory designation, whether such matter be equally suggestive or even descriptive, or possibly a particular variant of the term, may be sufficient to distinguish between them and to avoid confusion in trade. The rationale behind this rests on the obvious character of the term and the probability that purchasers have been exposed in the same retail outlets to such a plethora of trade designations consisting of or containing this notation that they have become compelled to distinguish between the features thereof, no matter how slight they may be". (Emphasis added.)

The Trademark Trial and Appeal Board cited, inter alia, The Fleetwood Company v. Hazel Bishop, Inc., 147 USPQ 344 (CA 7, 1965). Based on this reasoning each of AD's plus suffix marks is readily distinguishable from PP's mark PLUS.

Plus Products Allegation That  
American Dietaids Has Been Guilty  
of Unclean Hands Is Unsupported  
By the Evidence

The manner in which PP raised the issue of unclean hands, and the stress it places on that issue in its appeal brief is eloquent testimony to the total absence of merit in PP's case. (It also evidences PP's harassment of AD and supports AD's request set forth above for attorney's fees.)

In a surprise move at the trial, defendant accused plaintiffs of unclean hands alleging that statements on plaintiffs labels to the effect that, e.g., the vitamin C content of ACEROLA



PLUS tablets is all natural, are untrue. Defendant then proceeded, over plaintiffs' objections, to introduce testimony of two witnesses, Benjamin H. Ershoff and Carl David Warnick, to support this allegation. The trial court found this testimony both an unfair surprise and, at best, inconclusive (Appendix, P. 44).

Prior to trial, defendant never once referred to this allegation. Furthermore, although Plaintiffs' Interrogatory No. 19 requests defendant to identify any expert witness defendant plans to call at trial, and although both Messrs. Ershoff and Warnick were presented as expert witnesses, and although defendant knew it would present expert witnesses at least five days before the trial (Trial Transcript, Page 188 Line 12), defendant did not advise plaintiffs of these witnesses. Viewed another way, it is interesting that the issue of unclean hands, which was conjured up by PP only five days before the trial, takes up fully one half of PP's appeal brief. Despite the fact that PP's claim of unclean hands amounts to little more than name calling, it is the most important issue which PP can find to rely upon in prosecuting this appeal.

In its appeal brief, PP tacitly admits that no misbranding by AD has been proved; instead, PP now bases its unclean hands allegation on the argument that AD has not itself tested the vitamin C which it uses to make its tablets to be certain that the vitamin C is all natural. This approach by PP must fail, because it is believed to be based upon a misreading of the Federal Food, Drug, and Cosmetic Act, and a misapplication of United States v. Park, 421 U.S. 658.



Title 21 U.S.C., Sect. 331 prohibits certain acts. On page 9 of its brief, PP refers to 21 U.S.C. 331 (g) which prohibits "The manufacture within any Territory of any food, drug, device, or cosmetic that is adulterated or misbranded." PP points out that AD's vitamin C tablets are manufactured in Puerto Rico. Next, PP refers to 21 U.S.C. 333 (c) which excuses certain acts of misbranding if done in good faith, but which does not excuse the act described in Sect. 331 (g). Finally, PP refers to United States v. Park which, according to PP, holds that the Food, Drug, and Cosmetic Act imposes "a duty to implement measures that will insure that violations will not occur."

On page 10 of its appeal brief, PP refers to Mr. Okin's testimony to the effect that AD purchases its vitamin C from reliable sources, and relies on the "protocols" (i.e. guaranties) which accompany these shipments and represent that the vitamin C is all natural. PP impliedly admits that AD has acted in good faith by relying on these protocols. This implication arises from the fact that PP has not accused AD of violating 21 U.S.C. Sect. 331 (a) (prohibiting the introduction into interstate commerce of any food that is adulterated or misbranded), since violation of Sect. 331 (a) is excused by the good faith provisions of Sect. 333 (c). PP argues, however, that good faith does not excuse violation of acts defined in Sect. 331 (g).

What PP has missed is that 21 U.S.C. 321 (a) (2) defines "Territory" as "any Territory or possession of the United States, including the District of Columbia, and excluding the Commonwealth of Puerto Rico and the Canal Zone." (Emphasis added.) Thus, manufacture by AD in Puerto Rico does not fall within the language



of Sect. 331 (g) which PP has accused AD of violating.

PP failed to prove that AD misbrands its products, the evidence which it offered at trial being found by the trial court to be insufficient to support this allegation. Consequently, on appeal, PP has attempted to fall back on the argument that AD has violated the Food, Drug, and Cosmetic Act by relying on the representations of its suppliers that the vitamin C used to make AD's tablets is all natural, and not itself analyzing the naturalness of the vitamin C which it purchases. The problem with this approach is that it is of no moment whether or not AD is entitled to rely on its suppliers representation unless it is first proved that AD has violated the Act by misbranding its merchandise, i.e., by labeling a product "all natural" which is in fact not all natural. Since PP failed to prove misbranding, its contention that AD violated the Food, Drug, and Cosmetic Act must be rejected since there can be no violation without misbranding, regardless of whether or not AD has taken proper precautions to avoid misbranding.

To prove misbranding, PP simply had to present an analysis of AD's products, since it is possible to determine whether or not a vitamin C tablet does or does not consist of all natural vitamin C. The trial judge's comment on this point is perceptive:

"Finally, there was the failure of the experts [PP's experts] to analyze the plaintiff's products to determine whether, in fact, they contained natural or synthetic vitamin C. In view of the fact that various of plaintiff's products were weighed, tested for their vitamin potency, and found to accord with the statement on the labels, this oversight is quite astonishing."



Furthermore, PP's attempted analogy between the present case and United States v. Park cannot go unchallenged. In that case, the president of a national supermarket chain was found guilty of violating 21 U.S.C. 331 (k) on the ground that food in the corporation's warehouse was exposed to rodent contamination. Guilt was found although the president was not personally concerned with the violation. However, it was found that he knew of the violations, and relied on subordinates to correct them, and that he had been warned of previous similar violations by the Food and Drug Administration. In the present case, there has been no showing that AD knew of any misbranding, or that it has been warned in any way of misbranding.

In view of the above comments, it is clear that PP's charge of unclean hands is baseless, and that it does not dispose of AD's laches defense.

Although AD vigorously denies that any statements on its labels are untrue, even if it is assumed that AD's labels contain the false statements alleged by PP, such false statements do not give rise to unclean hands which will serve as a basis for denying AD the relief it seeks.

The reason is that the false statements on the labels alleged by defendant have no relation to the matters in dispute between the parties herein, namely, the issues of trademark infringement and laches. Hence, even if AD is guilty as charged by defendant, defendant is not in a position to benefit in this action.

The proposition is set forth in the U.S. Supreme Court decision of Keystone Driller Company v. General Excavator Company,



290 U.S. 240, 245; 19 USPQ 228, 230 (1933) as follows:

"But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, id., Sec. 100. Pomeroy, id., Sect. 399. They apply the maxim, not by way of punishment for extraneous transgressions but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion".

This case was followed by the Second Circuit Court of Appeals in Gillman v. Stern, 114 F. 2d 28; 46 USPQ 430 (1940) wherein the court rejected the contention that false advertising is a valid unclean hands defense to a charge of patent infringement.

\* \* \*

In the latter half of its brief, PP raises several other points which will now be discussed in the order presented by PP.

American Dietaids Does Not  
Admit Infringement

PP charges that because AD seeks cancellation of PP's PLUS registration, AD has admitted a likelihood of confusion between the trademark PLUS and AD's plus suffix trademarks. PP bases the contention on the language of 15 U.S.C. 1064 which states that



standing to sue for cancellation of a registration must be based on a belief that the person seeking cancellation is or will be damaged by the registration.

However, one can be damaged by a registration even if not using a trademark confusingly similar to the mark covered by the registration. For example, one who has never used a term similar to that registered may petition to cancel on the ground that the registered term is descriptive. Philip Morris Incorporated v. He-Man Products, Inc., 157 USPQ 200, Patent and Trademark Office Trademark Trial and Appeal Board.

In the present case, AD seeks cancellation of the PLUS registration not because PLUS is confusingly similar to any of AD's plus suffix trademarks. Instead, as described above, AD has been damaged by the false dates of first use appearing in the registration, and by the attempted enforcement of rights which PP appears to have from the face of the registration, but which PP is in fact not entitled to claim.

Plus Products Motion to Produce  
Documents Was Properly Denied

At the trial, PP moved to have AD produce the protocols which accompany the vitamin C purchased by AD, to determine whether or not these protocols do in fact state that the vitamin C is all natural. As mentioned above, PP did not raise the issue of unclean hands or indicate any need for the protocols until the trial was under way. Producing the protocols would have interrupted the trial and delayed it.

More important, producing the protocols would serve no



purpose. Even if the protocols did not indicate that the vitamin C purchased by AD is all natural, they are irrelevant since PP has not proved misbranding by AD. If PP had proved misbranding, and AD were relying upon the protocols to show its good faith, then the protocols would be relevant. However, this is not the case.

American Dietetics Trademarks Do Not  
Infringe Plus Products Trademark

There has been set forth above in some detail why there is no likelihood of confusion between the marks of the parties. Therefore, no extended discussion is needed at this point. However, a few comments on the statements in PP's brief appear to be in order.

PP refers on page 23 to PP's "well-known and unique reputation". The trial court made no finding as to PP's reputation, probably because there would be no likelihood of confusion regardless of PP's reputation, and because there was insufficient evidence presented to determine PP's reputation at the time AD first adopted its plus suffix trademarks. The only evidence on this point are four footnotes in the Adelle Davis book, and the testimony of Mr. Ingoldsby, the founder of defendant and its principal until 1968, who says defendant had a very good reputation. There is no objective testimony in the case concerning defendant's reputation in the late 1950s when plaintiffs started using plus suffix trademarks, and no evidence of the sales and distribution of the Davis book, and when it became a "best seller", if in fact it was a best seller.

Near the bottom of page 25 of its brief, PP states that



the descriptive prefixes of AD's trademarks should be disregarded, so that only the suffix "plus" is considered in determining likelihood of confusion. This suggested severance of the marks is an invention of defendant and is a fiction having no relation to reality. It is like arbitrarily separating the name "General Motors" and deciding that "general" is dominant and "motors" is nondistinctive, or vice versa. Clearly, the words "general" and "motors" by themselves mean nothing in terms of trademark significance. However, put them together as "General Motors" and the giant automobile company comes instantly to mind. It is the two words in combination which have significance, and not either word by itself.

On page 27 of its brief, PP alleges that it would be possible for AD to register PLUS as a trademark based on its use of plus suffix trademarks. This is not true. The Patent and Trademark Office does not permit registration of portions of trademarks, unless the portion sought to be registered stands out from the balance of the trademark and makes a separate commercial impression. This is not true in the plus suffix trademarks of AD.

On pages 28-31 of its brief, PP attempts to make it appear that Mr. Okin believes that AD's plus suffix marks and PP's trademark PLUS are confusingly similar. However, what Mr. Okin said, and obviously intended, is that use by PP of the word "acerola" in juxtaposition to its trademark PLUS might very well confuse purchasers as between AD's ACEROLA PLUS and PP's acerola product. In this regard, reference is made to Mr. Okin's trial testimony, pages 56, 57 and 85. Furthermore, it is clear that during his deposition, Mr. Okin was using the words "competition"



and "confusion" interchangeably, or he did not understand the questions he was being asked. PP's attorney asked a series of questions, beginning at Page 73, about products of the parties which are in competition. Mr. Okin answered each question using the word "confusing". On Pages 73 and 74 of his deposition, Mr. Okin compared PP's Formulas 10, 14 and 15 with plaintiff's product "M-8" and said there might be confusion. Obviously he meant competition, since the M-8 product does not bear a plus suffix trademark.

American Dietaids Adopted Its  
Plus Suffix Trademarks In Good Faith

The good faith adoption by AD of plus suffix trademarks is discussed above.

Beginning at page 32 of its brief, PP attempts to show that prior to adoption of plus suffix trademarks by AD, PP and AD were competitors in the mail order market. Regardless of whether or not this is true, it does not establish that Mr. Okin knew of PP prior to 1958, the date the first three plus suffix trademarks were adopted by AD. In the mail order business, competitors do not necessarily know of each other, since they may never come upon each other's products. This is different from competitors who sell their products through the same jobbers and retail outlets, where they are much more likely to see each other's products. PP did not enter the retail health food store market until 1960.

On page 36, PP attempts to show that Mr. Okin knew of Plus Products in 1960, the year the trademark ACEROLA PLUS was adopted, although Mr. Okin has testified that he first heard of

Plus Products no earlier than 1962 or 1963. Also, Mr. Okin testified that he did not know of Plus Products in 1958 when plaintiff's first plus suffix trademarks were adopted, but defendant ignores this testimony.

Conclusion

The registration of the trademark PLUS should be cancelled, and AD awarded attorney's fees, due to the false dates of first use set forth in the registration. AD's plus suffix trademarks do not infringe PP's trademark PLUS. Furthermore, PP is barred by laches from enforcing any trademark rights against AD based upon AD's use of plus suffix trademarks. AD is not guilty of unclean hands.

Breitenfeld & Levine

By Alan H. Levine  
Alan H. Levine  
350 Fifth Avenue  
New York, N. Y. 10001  
212-239-4162



Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically. ( 24 1976

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PLUS PRODUCTS,	)	Patent Appeal No.	76-552.
	)		
Appellant,	)		
	)		
v.	)		
	)		
GENERAL MILLS, INC.,	)		
	)		
Appellee.	)	Opposition No.	52,595.

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Decided: May 20, 1976

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BALDWIN, Judge.

DECISION

The decision of the Trademark Trial and Appeal Board<sup>1/</sup> is affirmed.

OPINION

The question before us is whether purchasers, confronted with the mark PROTEIN PLUS on breakfast cereal, would be likely to be confused regarding the cereal's source or origin. In particular, we must decide whether such purchasers would be likely to attribute to the cereal the same source as high protein vitamin products, mineral food fortifiers, food supplements, and fortifiers for breads, rolls, and buns bearing the mark PLUS.

1/ 188 USPQ 520 (TTAB 1975).

We note at the outset that the goods of the applicant and the opposer are marketed differently. From 90 to 95% of opposer's goods are sold through health food stores<sup>2/</sup> and, in those instances when they are sold in retail grocery stores, they are shelved in health food sections, not breakfast cereal sections. Although the same persons may buy PROTEIN PLUS breakfast cereals and PLUS health products, high nutrition foods invite careful scrutiny.

Furthermore, applicant's goods have characteristics and uses which differ from those of opposer's goods. Clearly, food additives and supplements are not used the same as breakfast cereals. The distribution of recipes encouraging the mixing of PLUS food supplements with a long list of goods, including breakfast cereals, does not compel the conclusion that the goods are closely related. Rather, the multitude of possible uses of food supplements and additives indicates that the goods differ in their essential characteristics and sales appeal. Opposer argues that breakfast cereals are a natural area of expansion for PLUS food supplements by showing that it now markets a breakfast cereal through a subsidiary company under the trademark GRAINDROPS. This showing, alone, does not establish that breakfast cereals are in the natural line of expansion for the mark PLUS as now used on vitamin products and food supplements.

<sup>2/</sup> The record shows that PROTEIN PLUS breakfast cereals would be precluded from sale in health food stores because they contain artificial preservatives.



Finally, we note that there are numerous food and food supplement products available whose marks end with PLUS (e.g., ORANGE PLUS) and there are numerous trademark registrations and applications in which the marks end with PLUS. Even though such marks were used subsequent to opposer's first use, they still reflect upon the state of mind of purchasers. This widespread use of the word PLUS, in the trademark sense, indicates that consumers have a high degree of sophistication in buying goods with PLUS as part of the trademark. Familiarity with such trademarks upon goods not originating with opposer would lead purchasers to infer that PLUS signifies its common dictionary definition.<sup>3/</sup> Furthermore, viewing the marks PROTEIN PLUS and PLUS in their entireties, as we must, we perceive little similarity of meaning, sound, or commercial impression. Thus, we must agree with the board that there is no likelihood of purchasers being confused, mistaken, or deceived regarding the origin of breakfast cereals labeled PROTEIN PLUS.

3/ Webster's Third New International Dictionary (1971) defines "plus" as "something additional or extra."

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn,  
deposes and says that deponent is not a party to the action,  
is over 18 years of age and resides at 62-20 60<sup>th</sup> RD  
MASPETH, N.Y..

That on the 25 day of AUGUST, 1976,  
deponent personally served the within BRIEF FOR AMERICAN  
DIET AIDS CO., INC. ET AL PLAINTIFFS APPELLEES & CROSS APPELANTS  
upon the attorneys designated below who represent the  
indicated parties in this action and at the addresses below  
stated which are those that have been designated by said  
attorneys for that purpose.

~~By leaving~~ true copies of same with a duly  
authorized person at their designated office.

By depositing 2 true copies of same enclosed  
in a postpaid properly addressed wrapper, in the post office  
or official depository under the exclusive care and custody  
of the United States post office department within the State  
of New York.

Names of attorneys served, together with the names  
of the clients represented and the attorneys' designated  
addresses.

BRUCE A. JAGGER, ESQ.  
BEEHLER, MOCK ABBE, ARANT, JAGGER & BAKHARD  
SUITE 1100  
3435 WILSHIRE BLVD.  
LOS ANGELES, CAL. 90010

Sworn to before me this

25 day of August, 1976

Robert La Grassa

Michael DeSantis  
MICHAEL DeSANTIS  
Notary Public, State of New York  
No. 02-0930908  
Qualified in Bronx County  
Commission Expires March 30, 1977